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## Grand Jury--Disclosure of Grand Jury Materials to Government Attorneys for Civil Use under Federal Rule of Criminal Procedure 6(e)

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# GRAND JURY—DISCLOSURE OF GRAND JURY MATERIALS TO GOVERNMENT ATTORNEYS FOR CIVIL USE UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 6(e)

**United States v. Sells Engineering, Inc., 103 S. Ct. 3133 (1983).**

## I. INTRODUCTION

In *United States v. Sells Engineering, Inc.*<sup>1</sup> the Supreme Court held that attorneys in the Civil Division of the Justice Department may gain access to grand jury materials for use in civil suits only if they obtain a court order authorizing such access.<sup>2</sup> The Court also held that courts should grant such disclosure orders only when government attorneys establish a "particularized need" for the materials.<sup>3</sup> The Court based its decision on the policy of grand jury secrecy, and on the legislative history of Federal Rule of Criminal Procedure 6(e), which governs the disclosure of grand jury materials.<sup>4</sup>

This Note begins with a review of the policy of grand jury secrecy, and a summary of the facts in *Sells* and of the Supreme Court's opinion. The Note then analyzes the Court's decision, concluding that while the policies underlying the rule of grand jury secrecy support the Court's decision, the decision may be criticized because the Court ignored its own well-established rules of statutory construction in its interpretation of Rule 6(e). Further, the Note concludes that the majority undermines the very goals the Supreme Court sought to achieve by its decision in *Sells* when it held that courts should weigh certain factors in favor of government attorneys when determining whether they have shown a "particularized need" for the grand jury materials.<sup>5</sup>

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<sup>1</sup> 103 S. Ct. 3133 (1983).

<sup>2</sup> *Id.* at 3136.

<sup>3</sup> *Id.*

<sup>4</sup> 103 S. Ct. at 3136-49. The complete text of FED. R. CRIM. P. 6(e) is reproduced *infra* note 13.

<sup>5</sup> 103 S. Ct. at 3149.

## II. BACKGROUND

## A. THE POLICY OF GRAND JURY SECRECY

The primary function of the grand jury is to investigate crimes and, where the grand jury investigation produces evidence sufficient to warrant criminal prosecution, to indict persons suspected of committing crimes.<sup>6</sup> The secondary, though hardly unimportant, function of the grand jury is to protect citizens against unfounded criminal prosecutions.<sup>7</sup>

One of the primary characteristics of the grand jury,<sup>8</sup> and also the

<sup>6</sup> *United States v. Calandra*, 414 U.S. 338, 343 (1974); 1 C. TORCIA, *WHARTON'S CRIMINAL PROCEDURE* § 189, at 8 (12th ed. 1974).

The grand jury investigates crimes and makes accusations; it does not determine guilt. *BLACK'S LAW DICTIONARY* 768 (rev. 5th ed. 1979). Federal Rule of Criminal Procedure 6 governs the grand jury process. Rule 6(a) directs federal courts to summon one or more grand juries "at such times as the public interest requires," and provides that the grand jury consist of between 16 and 23 jurors. Rule 6(g) requires that the grand jury serve until discharged by the court, but not longer than 18 months. Rule 6(f) provides that a grand jury may indict a prospective defendant only if 12 or more jurors concur in the indictment.

In general, the grand jury has the power to investigate any crime over which the supervising court would have jurisdiction. The grand jury, however, cannot investigate the official conduct of the executive branch of the government, but can inquire into the alleged commission of crimes in matters merely incidental to the conduct of government. A grand jury may investigate a matter on its own volition, without being so charged by a court. 1 C. TORCIA, *supra*, § 213, at 1.

<sup>7</sup> *Calandra*, 414 U.S. at 343; 1 C. TORCIA, *supra* note 6, § 189, at 8. Because of its dual function, the grand jury has been described as "both a sword and a shield." *In re Grand Jury*, January, 1969, 315 F. Supp. 662, 671 (D.C. Md. 1970). The grand jury dates back to 12th century Britain. Initially, its purpose was to investigate criminal behavior on behalf of the Crown. By the late seventeenth century, however, its role as a shield against arbitrary and oppressive governmental action became predominant. FRANKEL, *THE GRAND JURY—AN INSTITUTION ON TRIAL*, 6-9 (1977); Note, *Administrative Agency Access to Grand Jury Materials*, 75 COLUM. L. REV. 162, 163-64 n.13 (1975). The rule of grand jury secrecy evolved to guarantee the grand jury's role as a shield against abuses by the Crown. Pickholz & Pickholz, *Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards*, 36 WASH. & LEE L. REV. 1027, 1029 (1979). In America's early colonial days the grand jury's role as a "shield" against government abuses became predominant as a result of resistance to British authoritarian rule. L. CLARK, *THE GRAND JURY*, 19 (1975). This led to the inclusion of a provision regarding the grand jury in the Bill of Rights, ratified by the states in 1791. *See* U.S. CONST. amend V.

<sup>8</sup> The grand jury possesses three other major characteristics. First, the grand jury exists to carry out the criminal law, not the civil law. *See In re National Window Glass Cleaners*, 287 F. Supp. 219 (N.D. Ohio 1922); 1 C. TORCIA, *supra* note 6, § 215, at 470. Second, the grand jury possesses broad investigative powers extending far beyond normal discovery procedures. 1 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL*, Rule 6 § 101, at 197 (2d ed. 1982); *see infra* notes 93-103 and accompanying text.

Third, the grand jury theoretically acts independently of both the court and prosecutor. *United States v. Dionisio*, 410 U.S. 1, 16 (1973); *Stirone v. United States*, 361 U.S. 212, 218 (1960); *Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973); 1 C. WRIGHT, *supra*, § 101. "[I]ts authority is derived from none of the three basic divisions of our government, but rather directly from the people themselves." *In re April 1956 Term Grand Jury*, 239 F.2d 263, 269 (7th Cir. 1956). Thus, the grand jury is said to have the freedom to conduct its investigation

focus of concern in *Sells*, is that its proceedings are kept secret.<sup>9</sup> Although some commentators have argued that this policy of secrecy is "an anachronism that has long outlived any real necessity,"<sup>10</sup> the Supreme Court considers it "indispensable,"<sup>11</sup> and has stated that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."<sup>12</sup> The decision in *Sells* turned on the interpretation of Federal Rule of Criminal Procedure 6(e), which codifies this policy of grand jury secrecy.<sup>13</sup> While Rule 6(e) provides that grand jury

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"unhindered by external influence or supervision." *In re Grand Jury*, 446 F. Supp. 1132, 1135 (N.D. Tex. 1978). But see *infra* note 82 and accompanying text.

<sup>9</sup> *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958); *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962); *In re May 1972 San Antonio Grand Jury*, 366 F. Supp. 522, 533 (W.D. Tex. 1973); see also *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 n.9 (1979) ("Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye. . . . The rule of grand jury secrecy was imported into our federal common law and is an integral part of our criminal justice system."); *In re Petition for Disclosure of Evidence Before the October, 1959 Grand Jury of this Court*, 184 F. Supp. 38, 40 (E.D. Va. 1960) ("Secrecy of grand jury hearings has in history and in hornbook been a precept of criminal procedure. The nature and virility of the grand jury, as a common law institution, could be seriously weakened if the privileged privacy and security of its hearings were readily or freely withdrawn.").

<sup>10</sup> Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668, 684 (1962); see also Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MAR. J. PRAC. & PROC. 18 (1967); Comment, *Secrecy in Grand Jury Proceedings: A Proposal for a New Federal Rule of Criminal Procedure 6(e)*, 38 FORDHAM L. REV. 307 (1969); Comment, *Grand Jury Minutes and the Rule of Secrecy in Federal Litigation*, 55 NW. U. L. REV. 482 (1960); Note, *A Reexamination of the Rule of Secrecy of Grand Jury Minutes in the Federal Courts*, 34 N.Y.U. L. REV. 606 (1959).

<sup>11</sup> *United States v. Johnson*, 319 U.S. 503, 513 (1943).

<sup>12</sup> *Douglas Oil*, 441 U.S. at 218. Traditionally, five reasons have been advanced for the policy of grand jury secrecy:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

*United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261 (D. Md. 1931); see also *Douglas Oil*, 441 U.S. at 219 n.10; *Procter & Gamble*, 356 U.S. at 681-82 n.6; *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954).

Justice Powell has provided the following reasons for the policy of secrecy:

First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

*Douglas Oil*, 441 U.S. at 219.

<sup>13</sup> FED. R. CRIM. P. 6(e) provides:

proceedings and materials are usually to be kept secret, it also carves out certain exceptions.<sup>14</sup>

Under Rule 6(e)(3), parties may obtain access to grand jury materials in two ways. The first method is known as "court-ordered disclosure." Rule 6(e)(3)(C)(i) permits disclosure of grand jury materials "when so directed by a court preliminarily to or in connection with a judicial proceeding."<sup>15</sup> Generally, parties seeking (C)(i) court-ordered disclosure must demonstrate a "particularized need" for the grand jury materials.<sup>16</sup>

The second method by which parties may obtain disclosure of grand jury materials is known as "automatic access." Rule 6(e)(3)(A)

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(1) Recording of Proceedings.—All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

<sup>14</sup> See FED. R. CRIM. P. 6(e)(2), (3).

<sup>15</sup> In addition, under Rule 6(e)(3)(C)(ii) defendants may also obtain court-ordered access to grand jury materials "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." That situation was not at issue in *Sells*.

<sup>16</sup> See *infra* notes 44, 115-29 and accompanying text.

provides for automatic access in two very limited circumstances. First, (A)(ii) grants automatic access to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of *such attorney's duty to enforce federal criminal law*."<sup>17</sup> Second, (A)(i) permits automatic disclosure to "an attorney for the government for use in the performance of *such attorney's duty*."<sup>18</sup> The essential issue in *Sells* was whether, under the latter type of automatic access, "duty" includes enforcement of the civil law as well as the criminal law.

#### B. THE FACTS IN *SELLS*.

After investigating charges against Sells Engineering, Inc. of criminal fraud on the United States Navy and evasion of federal income taxes, a grand jury indicted Sells Engineering and two of its officers on two counts of conspiracy to defraud the United States and nine counts of tax fraud.<sup>19</sup> The individual respondents each pleaded guilty to one count of conspiracy to defraud the government. The district court dismissed all other counts.<sup>20</sup>

Thereafter, the government moved for disclosure of all grand jury materials to attorneys in the Civil Division of the Justice Department for use in a possible civil suit against respondents under the False Claims Act.<sup>21</sup> The district court granted the requested disclosure, over the respondents' objections,<sup>22</sup> concluding that Rule 6(e)(3)(A)(i) entitles attorneys in the Civil Division to automatic access as a matter of right.<sup>23</sup> The Ninth Circuit reversed and remanded, holding that Civil Division attorneys could obtain access to grand jury proceedings and materials only by seeking a (C)(i) court order and showing a "particularized need" for

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<sup>17</sup> FED. R. CRIM. P. 6(e)(3)(A)(ii) (emphasis added). "Attorney for the government," as used in Rule 6, "means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [or] an authorized assistant of a United States Attorney . . . ." F. R. CRIM. P. 54(c).

<sup>18</sup> FED. R. CRIM. P. 6(e)(3)(A)(i) (emphasis added).

<sup>19</sup> 103 S. Ct. at 3136. Sells Engineering had contracts with the United States Navy to produce airborne electronic devices designed to interfere with enemy radar systems. *Id.*

<sup>20</sup> *Id.* The opinion and order of the district court are not reported.

<sup>21</sup> *Id.* at 3137. Although the government asserted that a court order was unnecessary, it requested permission for disclosure in the alternative. The government has always contended that Civil Division attorneys are entitled to automatic access. *Id.* at 3137 n.4.

<sup>22</sup> Respondents opposed the disclosure, alleging grand jury abuse. The district court found it unnecessary to rule on this allegation, but stated summarily that had it considered the issue it would have found no abuse. *Id.* at 3137 n.5. Abuse of the grand jury process is a reason for denying disclosure of grand jury materials. *See, e.g.,* United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); *In re Grand Jury Proceedings*, Miller Brewing Co., 687 F.2d 1079, 1086 (7th Cir. 1982); *In re Grand Jury Subpoenas*, April, 1978, at Baltimore, 581 F.2d 1103, 1108 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

<sup>23</sup> 103 S. Ct. at 3137; *see supra* text accompanying note 20.

the materials.<sup>24</sup>

### C. THE SUPREME COURT'S DECISION

#### 1. *The Majority Opinion*

On appeal the Supreme Court affirmed the judgment of the Ninth Circuit, holding that Justice Department attorneys<sup>25</sup> may not have (A)(i) automatic access to grand jury materials for civil use, but rather must seek a (C)(i) court order to obtain disclosure.<sup>26</sup> The Court based its decision on the policies underlying the rule of grand jury secrecy and on the legislative history of Rule 6(e).

The majority first explained that (A)(i) automatic access should not be permitted for civil use because it would cause three kinds of "mis-chief." First, permitting automatic access for civil use would discourage witnesses from coming forward and testifying fully and candidly before the grand jury. The Court reasoned that if witnesses know that their grand jury testimony will be routinely available to the government for use in civil or administrative actions, the fear that such material may be used against them in another forum will inhibit their willingness to testify.<sup>27</sup> This is precisely what the rule of grand jury secrecy seeks to avoid.<sup>28</sup>

Second, the majority asserted that permitting automatic disclosure for civil use would tempt prosecutors to manipulate the grand jury's broad discovery powers<sup>29</sup> in order to elicit evidence solely for use in civil litigation.<sup>30</sup> The Court reasoned that such a temptation would arise if prosecutors knew their colleagues, without restriction, could use grand jury materials in civil litigation. The majority emphasized that "use of grand jury proceedings to elicit evidence for use in a civil case is improper *per se*."<sup>31</sup> In addition, the majority stressed that its concern stemmed less from the belief that grand jury abuse occurs frequently than from the fact that it is difficult to detect or prove such abuse when it occurs.<sup>32</sup>

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<sup>24</sup> *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1191-92 (9th Cir. 1981).

<sup>25</sup> The Court deemphasized the distinction between Civil Division and Criminal Division attorneys, stressing that the critical distinction for Rule 6(e) purposes is the type of use—civil or criminal. 103 S. Ct. at 3140.

<sup>26</sup> *Id.* at 3140, 3147. Justice Brennan wrote the majority opinion in which Justices White, Marshall, Blackmun, and Stevens joined.

<sup>27</sup> *Id.* at 3142.

<sup>28</sup> See *supra* note 12 and accompanying text.

<sup>29</sup> See *infra* note 82 and accompanying text.

<sup>30</sup> 103 S. Ct. at 3142. The Court further suggested that prosecutors might start or continue a grand jury investigation even where criminal prosecution appears unlikely. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; see *infra* notes 89-91 and accompanying text.

Third, the majority contended that a rule of automatic access for civil use would subvert the limitations imposed outside the grand jury context on the government's powers of discovery. The Court emphasized that the Federal Rules of Civil Procedure apply to Civil Division attorneys, just as they do to other civil litigants. The Court noted that because grand jury discovery powers are much greater than civil discovery powers under the Federal Rules,<sup>33</sup> a rule of automatic access for civil use would permit prosecutors to circumvent procedural limitations, limitations imposed for sound reasons "ranging from fundamental fairness to concern about burdensomeness and intrusiveness."<sup>34</sup>

The Court then turned to the legislative history of Rule 6(e). The Court conceded that one plausibly could argue that the inclusion in (A)(ii) of an express limitation to criminal matters,<sup>35</sup> and the absence of that limitation in the otherwise similar language of (A)(i),<sup>36</sup> suggest that Congress did not intend to place a criminal use limitation on (A)(i) disclosure.<sup>37</sup> The Court claimed, however, that "[t]he argument is not so compelling, nor the language so plain . . . as to overcome the strong arguments to the contrary drawn both from policy . . . and from legislative history."<sup>38</sup>

The majority noted that the contents of (A)(i) had been part of Rule 6(e) since the Rule was enacted in 1946, and that subparagraph (A)(ii) was added to Rule 6(e) in 1977 to allow automatic access to grand jury materials by nonattorneys assisting government attorneys.<sup>39</sup> The majority maintained that the fact that in 1977 Congress expressly limited (A)(ii) to enforcement of the criminal law does not establish that Congress never intended to place a criminal use restriction on (A)(i) automatic disclosure.<sup>40</sup> According to the Court, Congress had merely

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<sup>33</sup> See *infra* notes 93-102 and accompanying text.

<sup>34</sup> 103 S. Ct. at 3143.

<sup>35</sup> See *supra* text accompanying note 17.

<sup>36</sup> See *supra* text accompanying note 18.

<sup>37</sup> 103 S. Ct. at 3144. This was the position taken by the dissent in *Sells*. See *infra* notes 53-57 and accompanying text.

<sup>38</sup> *Id.* at 3144.

<sup>39</sup> *Id.* From 1946 until 1977, Rule 6(e) contained no provision for access to grand jury materials by nonattorneys assisting government attorneys. When Congress enacted the 1977 amendment, its concern focused on the increasing need of government attorneys to have the technical assistance of nonattorneys and the resulting need to disclose grand jury materials to those persons assisting government attorneys. *Id.* at 3144-45.

<sup>40</sup> *Id.* at 3144. In reaching that conclusion, the Court relied on the legislative history of (A)(ii). During the hearings on the 1977 amendment, Congressional criticism centered on two concerns: disclosure of grand jury materials to government agencies other than the Justice Department and use of grand jury materials for non-grand jury purposes. According to the Court, those two concerns were closely related, Congress' essential objection being to the use of grand jury materials for civil purposes. *Id.* at 3145. The majority emphasized that because the purpose of the 1977 amendment was to permit nonattorneys assisting government



made explicit in (A)(ii) what it believed to be already implicit in (A)(i)'s language.<sup>41</sup> In reaching the latter conclusion, the Court relied upon three isolated statements found in the legislative history of the 1977 amendment.<sup>42</sup> The Court seemed to suggest that in 1977 Congress believed that (A)(i) already contained a criminal use restriction.<sup>43</sup>

The majority then set forth the standard courts should apply in determining whether to grant (C)(i) disclosure motions made by Justice Department attorneys seeking grand jury materials for civil use. The Court held that government attorneys, like private parties, must make a strong showing of particularized need for the materials.<sup>44</sup> The Supreme Court described that standard in detail in *Douglas Oil v. Petrol Stops Northwest*<sup>45</sup> and quoted it with favor in *Sells*: parties seeking court-ordered disclosure of grand jury materials "must show that the material

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attorneys in criminal actions to have access to grand jury materials, *see supra* note 39, and because the amendment in no way purported to alter the provision governing access by Justice Department attorneys, Congress paid little attention to the issue of whether Justice Department attorneys might use grand jury materials for civil purposes. 103 S. Ct. at 3145-46.

<sup>41</sup> *Id.* at 3144.

<sup>42</sup> First, the *Notes of the Advisory Committee on Rules*, 18 U.S.C.A. App. 26 (1976 ed. Supp. VI), state that under the proposed amendment, disclosure to nonattorneys would be "subject to the qualification that the matters disclosed be used *only for the purposes of the grand jury investigation*." *Id.* at 28 (emphasis added). The Court stressed that at that time the proposed draft contained no express criminal use limitation, but only the double reference to "the performance of [government attorneys'] duties." From this the Court concluded that the Advisory Committee meant that automatic access to grand jury materials was permitted for criminal use only. 103 S. Ct. at 3145.

Second, the majority noted the statement of Acting Deputy Attorney General Richard Thornburgh, testifying on behalf of the Justice Department at the House Hearings on the proposed amendment: "It would be the practice of the Department at that time to seek a 6(e) order from the court in order that the [grand jury] evidence could be made available for whatever civil consequences might ensue." *Id.* at 3146.

Third, the majority quoted a statement in the Senate Report explaining the Senate's redraft of Rule 6(e), then in substantially the form as the present Rule: "The Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by . . . requiring that a court order under paragraph (C) be obtained to authorize such a disclosure." *Id.* at 3146-47.

<sup>43</sup> *See id.* at 3144-47.

<sup>44</sup> *Id.* at 3148. "Particularized need" is the standard courts usually apply in deciding (C)(i) disclosure motions. *Id.*; *see also* *Illinois v. Abbott & Associates, Inc.*, 103 S. Ct. 1356, 1361 (1983); *Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 217-24 (1979); *Dennis v. United States*, 384 U.S. 855, 869-70 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398-401 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-83 (1958). In *Sells*, the government had contended that if the Court held that (A)(i) prohibited automatic disclosure for civil use, the government should have to demonstrate only that the materials sought are relevant to matters within the scope of the government attorneys' duties in order to obtain a (C)(i) disclosure order. Brief for the United States at 13, *United States v. Sells Engineering, Inc.*, 103 S. Ct. 3133 (1983). The government asserted that the less restrictive "rational relationship" test, rather than the "particularized need" test, should be applied because government attorneys enforcing the civil law are serving the public interest. *Id.* at 43; *cf. infra* notes 125-29 and accompanying text.

<sup>45</sup> 441 U.S. 211, 222-23 (1979).

they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed . . . ."<sup>46</sup>

While the majority in *Sells* held that the same standard applies to the government as applies to private parties, it went on to emphasize that the particularized need standard is a flexible test. The standard is flexible in that the greater the need for secrecy, the greater the particularized need a party must demonstrate in order to obtain disclosure; the less the need for secrecy, the less particularized need a party must demonstrate.<sup>47</sup> The Court asserted that when government attorneys seek disclosure, the need for secrecy may not be as great as when private parties seek disclosure. This is because: (1) "disclosure to Justice Department attorneys poses less risk of further leakage or improper use [of grand jury materials] than would disclosure to private parties;" (2) the Justice Department's usual policy is to seek grand jury materials for civil use only after the criminal phase of the matter has closed; and (3) disclosure of grand jury materials to the government, even for civil use, serves the public interest.<sup>48</sup> The Court thus suggested that government attorneys seeking (C)(i) disclosure orders need not show as great a need for the materials as private parties may have to show.

## 2. *The Dissenting Opinion*

In his dissent, Chief Justice Burger<sup>49</sup> maintained that the majority's decision conflicted with the plain language of (A)(i).<sup>50</sup> According to the Chief Justice, the language of (A)(i) is clear, and nothing in that subparagraph remotely suggests that the only "duty" contemplated by (A)(i) is the prosecution of criminal cases.<sup>51</sup> Chief Justice Burger contended that that should have ended the matter.

Chief Justice Burger then asserted that the majority's holding also conflicted with the legislative history of Rule 6(e). He claimed that the

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<sup>46</sup> 103 S. Ct. at 3148.

<sup>47</sup> As the Court explained in *Douglas Oil*, 441 U.S. at 223,

[D]isclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and . . . the burden of demonstrating this balance rests upon the private party seeking disclosure. It is . . . clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. . . . In sum, . . . the court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court. And if disclosure is ordered, the court may include protective limitations on the use of the disclosed material . . . .

<sup>48</sup> 103 S. Ct. at 3149.

<sup>49</sup> Justices Powell, Rehnquist, and O'Connor joined the dissent.

<sup>50</sup> 103 S. Ct. at 3150 (Burger, C. J., dissenting).

<sup>51</sup> *Id.*

legislative history clearly supported the plain language of the Rule.<sup>52</sup> Chief Justice Burger focused on two particular aspects of the legislative history. First, he pointed out that the drafters of (A)(i) heard numerous arguments for and against granting automatic access to Justice Department attorneys, and thus "were fully aware of the breadth of the rule" they adopted.<sup>53</sup> According to the Chief Justice, the drafters would have changed the wording of (A)(i) had they intended the rule to have the restrictive meaning advanced by the majority.<sup>54</sup> Second, Chief Justice Burger noted that when Congress added (A)(ii) in 1977, it did so against a history of more than thirty years of consistent Justice Department practice of obtaining grand jury materials for civil use without court order.<sup>55</sup> Indeed, according to the dissent, on several occasions courts have held that civil attorneys for the Department of Justice could have automatic access to grand jury materials.<sup>56</sup> Thus, Chief Justice Burger concluded that had Congress intended to limit (A)(i) to criminal matters, it would have done so expressly in 1977.<sup>57</sup>

Chief Justice Burger then argued that the Court "erred gravely in its assessment of the policy implications."<sup>58</sup> He claimed that the secrecy concerns on which the majority relied have little relevance given that normal Justice Department practice calls for disclosing grand jury materials for civil use only after the grand jury proceeding and criminal action have concluded.<sup>59</sup> Chief Justice Burger asserted that in such a situation there is "no risk that potential defendants may flee or try to influence grand jurors or witnesses."<sup>60</sup> He further claimed that Justice Department attorneys are officers of the court bound to high ethical standards and are less likely to violate grand jury secrecy than are non-attorneys and private parties.<sup>61</sup>

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<sup>52</sup> *Id.* at 3151-52.

<sup>53</sup> *Id.* at 3153-54.

<sup>54</sup> *Id.* at 3154.

<sup>55</sup> *Id.* at 3154-56.

<sup>56</sup> *Id.* at 3156 (citing *United States v. General Electronic Co.*, 209 F. Supp. 197, 198-202 (E.D.Pa. 1962)); *see also* *United States v. Wohl Shoe Co.*, 369 F. Supp. 386 (D.N.M. 1974); *In re* July 1973 Grand Jury, 374 F. Supp. 1334, 1337 (N.D. Ill. 1973); *Washington v. American Pipe and Constr. Co.*, 41 F.R.D. 59, 62 (W.D. Wash., D. Or., D. Hawaii, N.D. Cal., S.D. Cal. 1966).

<sup>57</sup> 103 S. Ct. at 3156-59 (Burger, C. J., dissenting).

<sup>58</sup> *Id.* at 3159. Burger also maintained that the language and history of Rule 6(e) are so clear that the Court should not have resorted to policy considerations. *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* However, Chief Justice Burger did not respond to the one policy of the traditional five underlying the rule of secrecy, *see supra* note 12 and accompanying text, that most concerned the majority—encouraging witnesses to come forward and testify fully and candidly before the grand jury. *See supra* text accompanying notes 27-28.

<sup>61</sup> 103 S. Ct. at 3159-60. Burger also maintained that the mere potential for abuse of the grand jury process does not justify the majority's adoption of a blanket rule against granting

Finally, Chief Justice Burger contended that permitting government attorneys to have automatic access to grand jury materials for civil as well as criminal use would serve the public interest in two ways.<sup>62</sup> First, granting government attorneys automatic access, rather than "relegat[ing them] . . . to the civil discovery provisions," would save the government considerable time and expense.<sup>63</sup> Second, in many cases a rule of automatic access would enable the government to "enforce important laws in meritorious civil actions"<sup>64</sup> that it would otherwise be unable to enforce.<sup>65</sup> The dissent emphasized that enforcement of the civil law frequently serves the public interest as much as does enforcement of the criminal law.<sup>66</sup>

The Chief Justice concluded by criticizing the majority for providing little guidance to the lower courts and the Justice Department regarding the application of the majority's holding.<sup>67</sup>

### III. ANALYSIS

#### A. POLICY CONSIDERATIONS

The decision in *Sells* certainly is supported by policy considerations. The Court quite correctly found that automatic disclosure for civil use would cause three kinds of problems.

##### 1. *The Discouragement of Candid Grand Jury Testimony*

The majority in *Sells* feared that granting government attorneys automatic access to grand jury materials for civil use would discourage witnesses from coming forward and testifying fully and candidly before the grand jury.<sup>68</sup> Despite Chief Justice Burger's contention,<sup>69</sup> that concern presents a compelling case for preserving grand jury secrecy, even after the grand jury investigation has terminated and an indictment has been returned.<sup>70</sup> Courts must consider not only the immediate effects

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government attorneys automatic access to grand jury materials for civil use, but only justifies imposing sanctions in actual cases of abuse. *Id.* at 3160.

<sup>62</sup> *Id.* at 3161.

<sup>63</sup> *Id.* Chief Justice Burger claimed that the Federal Rules of Civil Procedure were designed with private litigants in mind, and that Justice Department attorneys were subject to the Federal Rules of Civil Procedure solely for lack of a better alternative. *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 3162-63.

<sup>66</sup> *Id.* at 3162.

<sup>67</sup> *Id.* at 3163. In particular, Chief Justice Burger noted that the majority remained silent on the issue of whether a particular Justice Department attorney who participated in a criminal investigation could subsequently use the grand jury materials in civil litigation. The majority expressly declined to resolve this issue. *Id.*

<sup>68</sup> See *supra* text accompanying notes 27-28.

<sup>69</sup> See *supra* text accompanying notes 58-60.

<sup>70</sup> 1 C. WRIGHT, *supra* note 8, § 106, at 244-46. Uninhibited testimony by grand jury

that disclosure may have upon witnesses testifying before a particular grand jury, but also the latent effects it may have upon the willingness of witnesses to testify before future grand juries.<sup>71</sup>

There are at least three reasons why grand jury witnesses will be reluctant to testify candidly if the government has access to grand jury proceedings and materials for civil use. First, and perhaps most important, if a grand jury investigation turns up civilly incriminating evidence against witnesses, those witnesses could be prosecuted in a subsequent civil action.<sup>72</sup> The last two reasons stem from the fact that the greater the access to grand jury materials, the greater the likelihood that they will fall into the hands of outside parties.<sup>73</sup> Thus, grand jury witnesses may fear that the person under investigation will seek retribution against them.<sup>74</sup> Furthermore, if it becomes publicly known that an individual has been associated with a grand jury inquiry, that individual could be socially stigmatized.<sup>75</sup>

## 2. *The Temptation to Manipulate the Grand Jury to Elicit Evidence for Civil Use*

The second policy issue that concerned the majority in *Sells* was that permitting (A)(i) automatic access for civil use would lead prosecutors to manipulate the grand jury's broad discovery powers to obtain evidence intended solely for civil use.<sup>76</sup> The Supreme Court has stated

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witnesses is essential to the proper functioning of the grand jury, the task of which is to investigate crimes and return indictments, and to protect the innocent from unfounded prosecution by the government. *See* *United States v. Scott Paper Co.*, 254 F. Supp. 759, 761 (W.D. Mich. 1966) (The need to encourage free disclosure by those having information about crimes is a "reason for secrecy which can be ignored by no court. It is a reason of paramount importance."); *see also* *United States v. Sobotka*, 623 F.2d 764, 767 (2d Cir. 1980); *United States v. Moten*, 582 F.2d 654, 663 (2d Cir. 1978); *United States v. Mohoney*, 495 F. Supp. 1270, 1272 (E.D. Pa. 1980); *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 470 (E.D. Pa. 1971); *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 486, 490 (E.D. Pa. 1962).

<sup>71</sup> *Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 221-24 (1979).

<sup>72</sup> This was suggested by the Supreme Court in *Sells*. 103 S. Ct. at 3142; *see supra* text accompanying note 27. This threat to grand jury witnesses is exacerbated by the fact that grand jury witnesses may not have a right to receive fifth amendment warnings. *See infra* note 100 and accompanying text.

<sup>73</sup> The Supreme Court appeared to suggest this in *Douglas Oil*, 441 U.S. at 222.

<sup>74</sup> *Id.* The defendant is not present during the grand jury investigation other than when he himself is giving testimony. *See* 38 AM. JUR. 2D *Grand Jury* § 34 (1968).

<sup>75</sup> *Douglas Oil*, 441 U.S. at 222.

<sup>76</sup> *See supra* text accompanying notes 29-32. Indeed, it has frequently been stated that permitting easy access under Rule 6(e) would encourage this. *In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1091-92 (7th Cir. 1982); *In re Special February, 1975 Grand Jury (Baggot)*, 662 F.2d 1232, 1237 (7th Cir. 1981), *aff'd*, 103 S. Ct. 3164 (1983); *In re Grand Jury Investigation No. 78-184 (Sells)*, 642 F.2d 1184, 1190 (9th Cir. 1981); *see also* Note, *Administrative Agency Access to Grand Jury Material Under Amended Rule 6(e)*, 29 CASE W. RES. 295, 320 (1978); Note, *Administrative Agency Access to Grand Jury Materials*, 75 COLUM. L. REV. 162, 166-67 (1975).

that if a prosecutor were to use the grand jury process to marshal evidence for use in a civil case, the prosecutor "would be flouting the policy of the law."<sup>77</sup> That is not to say that grand jury materials may never be disclosed for use in civil cases.<sup>78</sup> Subparagraph (C)(i), which authorizes courts to order disclosure of grand jury materials, contains no criminal use limitation.<sup>79</sup> Nevertheless, as the grand jury possesses extraordinary discovery powers precisely because it is a criminal proceeding that does not determine guilt, but only investigates and accuses,<sup>80</sup> "the use of these powers ought to be limited as far as reasonably possible to the accomplishment of the task."<sup>81</sup>

The potential for abuse of the grand jury is much greater today than when the grand jury was incorporated into the Bill of Rights or when Congress adopted Rule 6(e) in 1946. This is because "the government prosecutor has gained substantial influence over the grand jury, and subsequently that institution has lost much of its former independence."<sup>82</sup> The prosecutor, originally restricted from the presence of the grand jury, now literally conducts the inquest.<sup>83</sup> Normally, it is the United States Attorney who brings matters to the attention of the grand jury and initiates the investigation.<sup>84</sup> The United States Attorney causes subpoenas to be issued for witnesses and records.<sup>85</sup> In addition to determining what witnesses to call before the grand jury, it is the prosecutor who examines those witnesses.<sup>86</sup> The prosecutor also provides a great deal of technical assistance to the grand jury. The prosecutor gathers the evidence, presents it to the grand jury, explains the law, sums up the

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<sup>77</sup> *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958); see *Miller Brewing Co.*, 687 F.2d at 1086.

<sup>78</sup> See *Miller Brewing Co.*, 687 F.2d at 1087.

<sup>79</sup> See *supra* note 13.

<sup>80</sup> See *supra* note 6 and accompanying text.

<sup>81</sup> *Sells*, 103 S. Ct. at 3143 (citing *United States v. Mara*, 410 U.S. 19, 45-46 (1973) (Marshall, J., dissenting)).

<sup>82</sup> *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). Although the grand jury is theoretically independent of the executive branch of government, see *supra* note 8 and accompanying text, this no longer appears to be true. As the California Supreme Court has pointed out, "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." *Hawkins v. Superior Court of San Francisco*, 22 Cal. 3d 584, 590-91, 586 P.2d 916, 920, 150 Cal. Rptr. 435, 439 (1978) (quoting *United States v. Dionisio*, 410 U.S. 1, 23 (1972) (Douglas, J., dissenting)).

<sup>83</sup> See *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1119 (E.D. Pa. 1976).

<sup>84</sup> 1 L. ORFIELD, *CRIMINAL PROCEDURE UNDER THE FEDERAL RULES* § 6:82, at 449 (1966); Note, *The Grand Jury as an Investigative Body*, 74 HARV. L. REV. 590, 596 (1961).

<sup>85</sup> 1 L. ORFIELD, *supra* note 84, § 6:82, at 449.

<sup>86</sup> *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), cert. denied, 434 U.S. 825 (1977); *In re Lopreato*, 511 F.2d 1150, 1153 (1st Cir. 1975).

evidence, and requests the indictment.<sup>87</sup> The extraordinary control that prosecutors have over the grand jury vastly increases their ability to use the grand jury to marshal evidence solely for civil use.

Not only is the potential for grand jury abuse greater today, but a growing number of lower court decisions graphically demonstrate that such abuse is likely to occur.<sup>88</sup> Furthermore, the very fact that grand jury abuse is difficult to detect<sup>89</sup> and that claims of grand jury abuse

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<sup>87</sup> *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 522 (E.D.N.Y. 1974); 1 L. ORFIELD, *supra* note 84, § 6:74, at 441; see Proceedings of the Thirty-Sixth Annual Judicial Conference of the District of Columbia Circuit, 67 F.R.D. 513, 538 (1975). As one author has noted, "In practice . . . the district attorney, because of his access to information, prestige as an important government official, and familiarity with grand jury procedure, tends to direct the grand jury's operations." Note, *supra* note 84, at 596. Compare the prosecutor's central role in the grand jury process, discussed *supra* notes 83-86 and accompanying text, with the minimal role of the prospective defendant. Individuals under grand jury investigation are protected by fewer procedural guarantees than are defendants in civil or criminal actions. For example, individuals under grand jury investigation have no right to notice of the charges against them, to testify on their own behalf, to counsel before the grand jury, or to cross-examine witnesses and introduce rebuttal evidence. *United States v. Scully*, 225 F. 2d 113, 116 (2d Cir. 1955); *In re Black*, 47 F.2d 542, 543-44 (2d Cir. 1931); 1 L. ORFIELD, *supra* note 84, § 6:75, at 442; see also *supra* note 8 and accompanying text.

<sup>88</sup> Most of the cases of grand jury abuse involve abuse by attorneys for federal agencies as opposed to prosecutors. See *In re Grand Jury Subpoenas April, 1978*, at Baltimore, 581 F.2d 1103 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1976); *United States v. Doe*, 341 F. Supp. 1350, 1352 (S.D.N.Y. 1972); *Sam Cohen*, 43 T.C.M. 312 (1981). Nevertheless, the cases are relevant here because they involve abuse by agency attorneys made possible by their role as technical assistants to the grand jury, the same role the prosecutor plays. *United States v. Dionisio*, 410 U.S. 1, 23 (1973) (Douglas, J., dissenting); *Wood v. Georgia*, 370 U.S. 375, 390 (1962). The reason there are few cases of prosecutorial abuse may stem from the fact that grand jury abuse is difficult to detect and that claims of grand jury abuse usually fail. See *infra* notes 89-90 and accompanying text.

*Sells* may itself provide an example of grand jury abuse by prosecutors. In their brief to the Supreme Court, the respondents claimed that the Internal Revenue Service (IRS) initiated a grand jury investigation when its own administrative investigation became judicially stymied. Brief of Respondents at 26, *United States v. Sells Engineering, Inc.*, 103 S. Ct. 3133 (1983). The same IRS agents that conducted the administrative investigation conducted the grand jury investigation. *Id.* Further, the respondents alleged that the IRS, with the assistance of the United States Attorney's office, abused the grand jury subpoena power to induce witnesses to waive their fifth amendment rights, and to intimidate witnesses into appearing before IRS agents "voluntarily" to be interrogated under oath. *Id.* In addition, the respondents claimed that the IRS induced the U.S. Attorney to require, as a condition of the plea bargain, that the respondents sign a detailed admission of tax liability, prepared from grand jury materials 18 months before the IRS sought a (C)(i) disclosure order. *Id.* The respondents emphasized the role of the U.S. Attorney in this agency abuse. *Id.*

The district court in *Sells* never resolved the issue of grand jury abuse, but only stated summarily that had it decided the issue it would have found no such abuse. 103 S. Ct. at 3137 n.5. Both the Ninth Circuit and the Supreme Court held that the district court should have considered seriously the defendants' allegations of grand jury abuse, and remanded for such consideration. 642 F.2d at 1192; 103 S. Ct. at 3149 n.36.

<sup>89</sup> Grand jury abuse is difficult to detect for at least three reasons. First, it is often difficult

usually fail<sup>90</sup> may make prosecutors more willing to take the risk involved in engaging in such abuse.<sup>91</sup>

### 3. *The Subversion of Congressionally Imposed Limits on Civil Discovery Powers*

The third kind of "mischief" that concerned the majority in *Sells* was that allowing (A)(i) automatic access for civil use would, in effect, also allow the government to use the extraordinary subpoena power of the grand jury to subvert the procedural limits on civil discovery.<sup>92</sup>

The grand jury possesses discovery powers extending far beyond those available to civil litigants under the established rules of discovery and procedure.<sup>93</sup> The grand jury is relatively unrestricted in its power to compel the production of evidence or the testimony of witnesses that

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to ascertain whether a grand jury investigation occurred, as grand jury proceedings are generally kept secret. Second, it is frequently difficult to ascertain whether evidence used against a defendant in a civil proceeding was initially obtained from grand jury materials, since illegally obtained grand jury materials might have led to other legitimate evidence on the same subject. Third, it may be difficult to ascertain whether the government obtained such materials pursuant to a (C)(i) court order, as such orders are usually granted *ex parte*. See Brown, *Grand Jury Secrecy Violations*, BARRISTER, Fall 1981, at 31, 32.

<sup>90</sup> 1 C. WRIGHT, *supra* note 8, § 111.1, at 320. Claims of grand jury abuse usually fail for two reasons. First, there is a strong presumption favoring the regularity of grand jury proceedings. *Id.* at 326. Second, the party claiming that the grand jury process was abused bears a heavy burden even to obtain a hearing on the charges. *In re* Special April 1977 Grand Jury, 587 F.2d 889, 892 (7th Cir. 1978); *In re* Hunter, 520 F. Supp. 1020, 1022 (W.D. Mo. 1981); *United States v. Shober*, 489 F. Supp. 393, 409 (E.D. Pa. 1979).

<sup>91</sup> These factors also weigh against the dissent's suggestion in *Sells* that the threat of grand jury abuse does not justify a blanket rule prohibiting automatic disclosure to the government for civil use, but rather that incidents of abuse can be handled on a case-by-case basis. See *supra* note 61.

<sup>92</sup> See *supra* note 34 and accompanying text.

<sup>93</sup> 1 C. WRIGHT, *supra* note 8, § 101, at 197. The grand jury is accorded such broad discovery powers because it only determines whether criminal proceedings should be instituted and does not adjudicate guilt. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *United States v. Ciambrone*, 601 F.2d 616, 622 (2d Cir. 1979). Justice Powell stated in *United States v. Calandra*, 414 U.S. 338, 343-44 (1973) (citations omitted):

Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. . . .

The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.

See also *Blair v. United States*, 250 U.S. 273, 282 (1919); *United States v. Doulin*, 538 F.2d 466, 469 (2d Cir.), *cert. denied*, 429 U.S. 895 (1976); *Schwartz v. United States Dept. of Justice*, 494 F. Supp. 1268, 1276 (E.D. Pa. 1980).



it deems appropriate.<sup>94</sup> "[I]ts operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials."<sup>95</sup> Thus, for example, while witnesses in civil suits have the right to refuse to answer irrelevant questions, that right is severely restricted in the grand jury context.<sup>96</sup>

Further, the grand jury's discovery powers extend not only beyond normal procedural limitations, but also beyond certain normal constitutional limitations. Thus, although a grand jury cannot require a witness to produce or testify to matters protected by privilege,<sup>97</sup> constitutional privileges may apply differently in the grand jury context than in other judicial proceedings. For example, the first amendment does not protect journalists from appearing before grand juries or from answering "relevant and material questions asked during a good-faith grand jury investigation."<sup>98</sup> Moreover, illegally obtained evidence may be presented to the grand jury.<sup>99</sup> Finally, while the fifth amendment privilege against self-incrimination applies to grand jury proceedings, the Supreme Court has not decided whether grand jury witnesses must receive fifth amendment warnings.<sup>100</sup>

In all these respects, then, the grand jury has access to a vast amount of information to which civil litigants do not have access under normal procedural and constitutional limitations on discovery. Thus, if the government could gain access to grand jury materials for use in civil cases, it would have a great advantage over its civil opponent.<sup>101</sup> As the

<sup>94</sup> *Calandra*, 414 U.S. at 343. While the evidence and testimony sought must be relevant to the investigation, "the relevancy of the questions proposed to bring out the evidence need not be conclusively established. It is enough that there is a 'justifiable suspicion' that the questions are related to the subject of the investigation." 83 AM. JUR. 2D *Grand Jury* § 37 (1968).

<sup>95</sup> *Calandra*, 414 U.S. at 343. The Federal Rules of Evidence do not apply to proceedings before a grand jury. 1 C. WRIGHT, *supra* note 8, § 104, at 220-21; Note, *Recent Developments in the Law of the Federal Grand Jury*, 1977 UTAH L. REV. 170, 213.

<sup>96</sup> *Bursey v. United States*, 466 F.2d 1059, 1076 (9th Cir. 1972).

<sup>97</sup> 1 C. WRIGHT, *supra* note 8, § 104, at 222.

<sup>98</sup> *Branzburg*, 408 U.S. at 708; 1 C. WRIGHT, *supra* note 8, § 104, at 222-23.

<sup>99</sup> See *Calandra*, 414 U.S. at 354-55; *In re Weir*, 495 F.2d 879, 880-81 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974); 1 C. WRIGHT, *supra* note 8, § 104, at 224-25.

<sup>100</sup> *United States v. Washington*, 431 U.S. 181, 186 (1977); 1 C. WRIGHT, *supra* note 8, § 104, at 227-28.

<sup>101</sup> Of course, the civil opponent could gain access to grand jury materials by seeking a (C)(i) court order and demonstrating "particularized need" for the disclosure. See *supra* notes 15-16 and accompanying text. Under the particularized need standard, however, courts generally order disclosure of grand jury materials only for such purposes as impeaching a witness, testing the credibility of a witness, refreshing a witness's memory, and the like. 1 C. WRIGHT, *supra* note 8, § 109, at 283-84; see *Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 222 n. 12 (1979); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958). A rule of automatic access, however, would permit the government to use grand jury materials for such purposes as discovering violations of the civil law, framing complaints, and preparing for trial

federal rules of procedure and discovery apply to the government as well as to private parties,<sup>102</sup> permitting (A)(i) automatic access for civil use would indeed subvert the traditional limits on procedure and discovery.

#### B. LEGISLATIVE INTENT REGARDING RULE 6(e)

While policy considerations support the majority's decision, the decision may be criticized because the Court ignored its own well-established rules of statutory construction in its interpretation of Rule 6(e). Not only did the majority fail to make any reference to these rules, but its statutory analysis in no way comports with these rules. Indeed, the dissent's analysis comports far better than the majority's with the rules of statutory construction.

The Supreme Court has held that courts should interpret federal statutes under the established rules of statutory construction.<sup>103</sup> The foremost rule of construction requires courts to give effect to Congress's intent in enacting a given statute.<sup>104</sup> In determining legislative intent, courts must look first to the language of the statute.<sup>105</sup> This is known as the plain meaning rule. On its face, the language of Rule 6(e)(3)(A)(i) appears quite clear. It grants government attorneys automatic access to grand jury materials "for use in the performance of such attorney's duty." The language contains no criminal use limitation, as read into the statute by the Court in *Sells*.

However, the meaning apparent on the face of the statute need not

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in general. On the other hand, defendants involved in the same litigation would not have access to those same materials unless they were able to show a particularized need.

<sup>102</sup> As one commentator has suggested,

[A] reading of the Federal Rules [of Civil Procedure] as a whole indicates that they were meant generally to apply to the Government as well as any other party to a civil action. Rule 12 specifically extends the time within which the United States may plead to sixty days. Rule 4 makes an exception of the United States in the procedure of service of process on the United States. And most imperative is Rule 81 wherein all the exceptions to the Rules are cited: and nowhere in Rule 81 is the United States exempt from the general application of the Rules.

Note, *Federal Procedure—Applicability of Discovery Procedure under Federal Rules to the United States*, 27 MARQ. L. REV. 158, 158 (1943); see also *Procter & Gamble*, 356 U.S. at 681; *United States v. Nat'l City Bank of New York*, 83 F.2d 236, 238 (2d Cir. 1936); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 584 (E.D.N.Y. 1939).

<sup>103</sup> *Bardes v. Hawarden Bank*, 178 U.S. 524 (1900); 73 AM. JUR. 2D *Statutes* § 144 (1974).

<sup>104</sup> *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

<sup>105</sup> *Albernaz v. United States*, 450 U.S. 333, 336 (1981); see also *United States v. N.E. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942). This rule stems from the fact that Congress votes only on the language of a statute. In reality, the members of Congress may each intend many different results by voting to adopt that language. See generally *Banco Mexicano de Comercio e Industria v. Deutsche Banke*, 263 U.S. 591, 602 (1924); *Omaha & C. B. Street Ry. Co. v. Interstate Commerce Commission*, 230 U.S. 324, 333-34 (1913); *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845); 73 AM. JUR. 2D *Statutes* § 196 (1974).

end a court's inquiry into legislative intent.<sup>106</sup> The circumstances of the enactment of a statute may persuade a court that Congress did not intend words of common meaning to have their literal effect.<sup>107</sup> Indeed, the Supreme Court has declared that courts may resort to explanatory legislative history, regardless of how clear the words of a statute may appear on superficial examination.<sup>108</sup>

Another rule of statutory construction bears significantly on the interpretation of Rule 6(e). Where the courts and other parties have placed a particular construction on the language of a statute for a long time, Congress's failure to express disapproval amounts to legislative sanction of that construction.<sup>109</sup> This rule applies particularly where Congress amends the statute in other respects.<sup>110</sup>

This rule of construction to subparagraph (A)(i) suggests that the dissent's position in *Sells* is far more tenable than the majority's. The majority ignored the construction that the courts and the Justice Department had for years given to (A)(i). The dissent, on the other hand, noted that when Congress added (A)(ii) in 1977, it did so against a backdrop of more than thirty years of consistent Justice Department practice of using grand jury materials without court order in civil suits, and against a backdrop of courts consistently upholding this practice. Thus it appears, as the dissent maintained, that Congress understood in 1977 that under (A)(i) all Justice Department attorneys were authorized to use grand jury materials in the full range of their duties—including civil matters—and chose to leave that standard unchanged.<sup>111</sup>

Because there is some support in the legislative history for the Court's interpretation of Rule 6(e),<sup>112</sup> the Court cannot be accused of revising the statute and acting as a superlegislature.<sup>113</sup> Nonetheless, the

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<sup>106</sup> *Watt v. Alaska*, 451 U.S. 259, 266 (1981).

<sup>107</sup> *Id.*; *American Trucking Ass'n*, 310 U.S. at 543.

<sup>108</sup> *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943); 73 AM. JUR. 2D *Statutes* § 150 (1974).

<sup>109</sup> *Helvering v. Griffiths*, 318 U.S. 371, 397-404 (1943); *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 275-76 (1942); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 324-25 (1933); 73 AM. JUR. 2D *Statutes* §§ 161-62, 164 (1974). The Supreme Court has held that great weight should be given to the longstanding construction of a statute by the agency charged with administering it. *NLRB v. Boeing Co.*, 412 U.S. 67, 74-75 (1973); *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

<sup>110</sup> *Missouri v. Ross*, 299 U.S. 72 (1936). This is because a presumption exists that at the time Congress adopts (or, as in *Sells*, modifies) a particular statute, it had knowledge of the historical circumstances related to the act's subject matter.

<sup>111</sup> *Sells*, 103 S. Ct. at 3159 (Burger, C.J., dissenting).

<sup>112</sup> See *supra* notes 39-43 and accompanying text.

<sup>113</sup> Under the doctrine of separation of powers, courts have no legislative authority. See *Ebert v. Poston*, 266 U.S. 548, 554 (1925); *Braffith v. Virgin Islands*, 26 F.2d 646, 648 (3d Cir. 1928). Regardless of a court's opinion of the wisdom of a statute, the court's duty is to apply the statute as found, and not to revise it. *Board of Education v. Public School Employees'*

Court can be criticized for having ignored its own well-established rules of statutory construction because it is reasonable to assume that legislatures rely on these rules when they write statutes.<sup>114</sup> For the Court to change the rules after the "game" has begun is indeed cause for criticism.

C. "PARTICULARIZED NEED" TEST

The majority in *Sells* emphasized that the particularized need test is a flexible standard under which the need for disclosure must be balanced against the public interest in secrecy.<sup>115</sup> Thus, the less the need for secrecy, the less particularized need a party has to show to obtain a (C)(i) disclosure order.<sup>116</sup> The majority asserted that when government attorneys seek access to grand jury materials, three factors decrease the need for secrecy.<sup>117</sup> The majority's emphasis on those three factors, however, is inappropriate.

First, the majority asserted that disclosure to Justice Department attorneys poses less risk of further breach of secrecy or abuse of the grand jury than would disclosure to private parties.<sup>118</sup> There is no reason to assume, however, that disclosure to government attorneys poses less risk. Clearly, abuse of the grand jury by government prosecutors to marshal evidence solely for civil use is likely to occur.<sup>119</sup> Indeed, while prosecutors have ample opportunity to abuse grand jury proceedings to elicit evidence for civil suits, private parties have no opportunity to abuse the grand jury as they have no right to even appear before the grand jury.<sup>120</sup> Further, the Court stressed that one of the policies behind the rule of grand jury secrecy is to ensure that witnesses come forward

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Union, 233 Minn. 144, 152, 45 N.W.2d 797, 802 (1951); see *Matson Navigation Co. v. United States*, 284 U.S. 352, 356 (1932); 73 AM. JUR. 2D *Statutes* § 197 (1974). The theory of separation of powers is not expressly announced in the United States Constitution. The doctrine arises, however, from the fact that the Constitution creates three departments of government, vesting the legislative power in one, the executive power in another, and the judicial power in a third. S. DODD, *STATE GOVERNMENT* 58 (2d ed. 1928).

<sup>114</sup> This conclusion may be drawn from an analogous presumption. Thus, the legislature is presumed to know the meaning of words, and to have used the words of a statute advisedly. *In re* Opinion of Justices, 303 Mass. 631, 638, 22 N.E.2d 49, 55 (1939); *State v. Ross*, 272 N.C. 67, 71, 157 S.E.2d 712, 715 (1967); *Gord v. Salt Lake City*, 20 Utah 2d 138, 140, 434 P.2d 449, 451 (1967). Further support for this conclusion stems from the fact that statutes are considered to have been enacted with a view toward their interpretation under the settled principles of statutory interpretation. 73 AM. JUR. 2D *Statutes* § 142 (1974).

<sup>115</sup> See *supra* note 46 and accompanying text.

<sup>116</sup> See *supra* note 47 and accompanying text.

<sup>117</sup> See *supra* note 48 and accompanying text.

<sup>118</sup> See *id.*

<sup>119</sup> See *supra* note 88 and accompanying text.

<sup>120</sup> See *supra* note 87 and accompanying text.

and testify fully and candidly before the grand jury.<sup>121</sup> Disclosure to government attorneys, however, may inhibit grand jury witnesses as much as does disclosure to private parties, since disclosure to government attorneys may lead to the filing of a civil suit against them.<sup>122</sup> Thus, the knowledge that supposedly secret grand jury testimony may be released to the government in the future may lead grand jury witnesses to testify less candidly and completely than they would otherwise.

The second factor the Court said should be weighed in favor of government attorneys when applying the particularized need test is the fact that it is the usual policy of the Justice Department not to seek civil uses of grand jury materials until the criminal phase of a matter has closed.<sup>123</sup> That fact, however, does not render grand jury secrecy concerns irrelevant because lifting the veil of grand jury secrecy affects the willingness of witnesses to testify before grand juries in the future, even if grand jury materials are not disclosed until the close of a criminal case.

The third factor that the majority believed courts should weigh in favor of government attorneys is that enforcement of the civil law serves the public interest.<sup>124</sup> While the majority did not state what it meant by "the public interest," the dissent in *Sells* enumerated two public interests served by granting Justice Department attorneys automatic access to grand jury materials for civil use: saving time and money by not having to observe normal discovery procedures, and prosecuting civil actions that would otherwise fail for lack of evidence.<sup>125</sup>

As to the first interest, considerations of time and money must yield to the primary concern of ensuring a fair and impartial trial.<sup>126</sup> As to the second interest asserted by the dissent, one cannot deny that enforcing the civil law serves the public interest. However, Congress appears to have determined that for reasons of fairness and concern about intrusions on personal privacy, civil discovery should be limited,<sup>127</sup> even though that means actions may fail for lack of evidence. It thus seems that Congress has determined that interests of fairness and privacy may outweigh society's interest in enforcing the civil law.

#### IV. CONCLUSION

Although the policies underlying the rule of grand jury secrecy provide strong support for the Supreme Court's decision in *Sells*, the deci-

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<sup>121</sup> See *supra* notes 27-28 and accompanying text.

<sup>122</sup> See *supra* note 72 and accompanying text.

<sup>123</sup> See *supra* note 48 and accompanying text.

<sup>124</sup> See *id.*

<sup>125</sup> See *supra* notes 62-66 and accompanying text.

<sup>126</sup> *Moss v. Associated Transport, Inc.*, 344 F.2d 23, 26 (6th Cir. 1965).

<sup>127</sup> *Sells*, 103 S. Ct. at 3143.

sion may be criticized because the Court ignored its own well-established rules of statutory construction in its interpretation of Rule 6(e). Further, the Court undermined the very goals it sought to advance by holding that when government attorneys seek access to grand jury materials, the need for secrecy is not as strong as when other parties seek access, and that therefore the government does not have to show as much particularized need for the grand jury materials as do other parties.

TAMMY JO BERGE